

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLBY GOROG, JOSHUA FLINT,
LOUIS ROBINSON, and MICHAEL LERRO,
individually and on behalf of all others
similarly situated,

Plaintiffs,
v.

ELON MUSK and TESLA, INC.,

Defendants.

Civil Action No.: 1:22-cv-05037-AKH

**DECLARATION BY PLAINTIFFS'
COUNSEL EVAN SPENCER IN
SUPPORT OF MOTION TO
DISQUALIFY AND SANCTION**

I, Evan Spencer, attorney for Plaintiffs, hereby swear and affirm under penalty of perjury that the following is true and accurate:

- 1) I am Counsel for Plaintiffs and submit this Declaration in support of Plaintiffs' *Motion to Disqualify and Sanction Defense Counsel*. See Dk. #82.
- 2) I have practiced law for 26 years, I work with a motivated and highly competent team of attorneys and assistants whom I trust, I have the experience necessary to litigate this case, and every single allegation in Plaintiffs' Third Amended Complaint ("TAC") was made in good faith after 15 months of painstaking research and investigation.
- 3) On May 22, 2023, over two weeks prior to filing the TAC, Plaintiffs sent a draft of the TAC to Defendants in good faith, to request permission to file it.
- 4) On June 2, 2023, Defendants withdrew their opposition to the filing of the TAC and voluntarily entered a briefing schedule that was later modified by the Court.
- 5) On June 7, 2023, at 7:27 pm, I filed the TAC with the permission of Defendants and at the direction of the Court. By that time, Defense Counsel had been in receipt of the TAC for seventeen (17) days.

- 6) In seventeen days (from May 22, 2023, when Defendants were provided a copy of the TAC, to June 7, 2023, when the TAC was filed) Defendants raised no Rule 11 objection (nor any other substantive objection) to the TAC.
- 7) On June 9, 2023, at 6:09 am, less than 36 hours after Plaintiffs filed the TAC, Defense Counsel Alex Spiro emailed me a purported Rule 11 letter. See Dk. 83, Attachment #1. The letter demanded, on purported Rule 11 grounds, that the TAC (and thus, Plaintiffs' entire case) be withdrawn within three days because it was a "fabrication."
- 8) Although the aforesaid letter contained generalized denials of a handful (not all) of the TAC's allegations, in three pages the letter provided me with absolutely no notice of just what about the TAC constitutes a violation of Rule 11. See discussion in Dk. 85 (Plaintiffs' Reply Brief) pp. 15-17. In addition to its denials and demands, this letter deprecated Plaintiffs' case and personally impugned my competence, integrity, and professionalism in the most blatantly false, insolent and uncollegial terms.
- 9) On the morning of June 14, 2023, I received an email from one Joshua Kosman, a reporter for the *New York Post*, with the subject heading "NY Post time sensitive story." This email stated as follows:

We are reporting a story on the letter Alex Spiro sent to you June 9 alleging that neither Elon Musk or Tesla owned the wallets owning Dodgecoin [sic] alleged in your third amended complaint.

Please call me by 2:30 if you would like to respond on or off record.
- 10) I do not know Mr. Kosman, and neither I nor anyone on my team disseminated Spiro's letter to Kosman, nor to anyone else.

11) The only possible way that Spiro's letter could have found its way into the *New York Post* is if Defense Counsel(s) or an agent or subordinate acting on their behalf provided it to the *Post*.

12) Mr. Kosman's bio on the *Post* website states, "Josh has regularly broken news on major stories including Elon Musk's takeover of Twitter..." which suggests that Defendants have a working relationship with Kosman and provided their letter to him. See Exhibit "A".

13) On June 15, 2023, the *Post* published an article authored by Kosman, with the headline, "Elon Musk denies owning Dogecoin wallets amid lawsuit alleging insider trading". See Exhibit "B".

14) Kosman's article states, in part, as follows:

Musk's lawyer Alex Spiro fired off a nasty missive to plaintiff's lawyer Evan Spencer disputing his assertions and questioning his competency as an attorney.

"You specifically allege, without basis, that the following wallets 'belong' to Defendants," Spiro said in the June 9 letter obtained by The Post. "You are wrong."

"The sole basis for your claim is that these wallets sold Dogecoin at a time when, according to the Third Amended Complaint, prices were up," the letter said.

15) The above-quoted portions of Spiro's letter are untrue: the TAC provides a great deal more basis for the allegations Spiro was referring to than his letter indicates. See Dk. 85 (Plaintiffs' Reply Brief) pp. 15-17.

16) Kosman's story was published on the *Post*'s website, picked up by other media outlets including the widely read *Yahoo!* news aggregator¹, popular financial news sites *Benzinga*²

¹ "Elon Musk Denies Ownership of Dogecoin Wallets in Lawsuit". Torpey, Kyle. June 18, 2023. *Yahoo! Finance*. Retrieved July 12, 2023. <https://finance.yahoo.com/news/elon-musk-denies-ownership-dogecoin-031139545.html>

² "Elon Musk Denies Owning Dogecoin in Response to Insider Trading Lawsuit". Pattnaik, Bibhu. June 17, 2023. *Benzinga*. Retrieved July 12, 2023. <https://www.benzinga.com/markets/cryptocurrency/23/06/32904982/elon-musk-denies-owning-dogecoin-in-response-to-insider-trading-lawsuit>

and *Decrypt*³, and the *International Business Times*⁴, and was republished to millions of people throughout the United States.

17) As a result of the *Post* article, which was brought to my attention by one of my clients, I needed to assuage the fear and doubt it caused my clients about this case.

18) It appears Defendants are using their bottomless war chest to finance an unlawful harassment campaign against me and my clients.

19) On June 22, 2023, Defense Counsels emailed me a proposed motion for Rule 11 sanctions, a draft memorandum in support, supporting exhibits, as well as a declaration from Tesla employee Suk Patel, and a declaration from Defendant Musk's majordomo, Jared Birchall, all of which Defense Counsels threatened they would file. See Exhibit C, parts C1-C6.

20) These materials, though rife with denials and invective, gave no more notice of how exactly the TAC violates Rule 11 than Spiro's June 9th letter did. The aforesaid declarations contained only denials of some of the TAC's allegations, without providing any elaboration or evidentiary support.

21) Defense counsels' draft memorandum also contains disparagement of me personally, of my competence, integrity, and conduct of prior cases, all of which is irrelevant to this action.

22) Having managed to publish false claims about me in the media once before, Defense Counsels were and are threatening to place this disparagement of me into the public record again.

³ "Elon Musk Denies Owning Dogecoin Stash Linked to Insider Trading." Solimano, Pedro. June 17 2023. *Decrypt*. Retrieved July 12, 2023. <https://decrypt.co/145043/elon-musk-dogecoin-wallets-insider-trading>

⁴ "Elon Musk's Lawyer Refutes FUD Surrounding His Client's Ownership of Pump-and-Dump DOGE Wallets". Osorio, Nica. June 19, 2023. *International Business Times*, Retrieved July 12, 2023. <https://www.ibtimes.com/elon-musks-lawyer-refutes-fud-surrounding-his-clients-ownership-pump-dump-doge-wallets-3700591>

23) Prior to dismissal, Defendants' request for Rule 11 sanctions is not ripe, none of the aforementioned materials they sent me furnished Plaintiffs with proper notice under Rule 11, and Defense Counsels knew or should have known all of this.

24) Defendants' conduct as hereinbefore described directly violates and attempts to circumvent a standing order from this Court which sets forth a briefing schedule for Defendants to respond to the TAC.

25) Defense Counsel's response in opposition to Plaintiffs' motion to disqualify fails to admit or deny that they provided their June 9th letter to the *New York Post*, which they have an ethical obligation to do.

26) Concurrent with the filing of Plaintiffs' motion to disqualify and sanction, I filed disciplinary complaints against Defense Counsels with the Grievance Committee of this District Court and the New York State Grievance Committee, in accordance with and fulfillment of my ethical obligations as a member of the bars of this State and this District, respectively.

27) On May 20, 2022, approximately one month prior to retaining Quinn Emanuel, Musk tweeted, "Tesla is building a hardcore litigation department," and "Looking for hardcore streetfighters, not white-show lawyers like Perkins or Cooley who thrive on corruption. There will be blood." See Exhibit "D". Defense Counsels' misconduct as hereinbefore described is certainly consistent with the ruthlessness Musk evidenced in those tweets.

SWORN TO THIS 12th DAY OF JULY, 2023 BY:

s/Evan Spencer
EVAN SPENCER
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th Day of July, 2023, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, giving notice to all parties in this action.

/s/Evan Spencer
Evan Spencer, Esq.